

The Administrative Law Judge (ALJ) ordered the deceased claimant's spouse to return a wheelchair and shower chair previously made available for the use of the claimant. The ALJ denied respondent's request for the return of a wheelchair accessible van, finding

that respondent is estopped from claiming an interest in the van since it could have protected its interest at the time the van was purchased and did not do so.

The respondent argues that although it was not required to provide claimant with the van under the statute, providing the van was permissible and was designed to provide transportation for the claimant. As such, respondent contends it is entitled to have the van returned. Respondent also argues that there is precedent for the return of the wheelchair lift from the van and that since the Board's review is de novo, it was not necessary that respondent have argued this issue to the ALJ.

The deceased claimant's spouse argues that respondent has no legal interest or title in the van and that its request for the return of the van is outside the scope of the Workers Compensation Act. She further argues that the van was a gift and respondent has no legally enforceable right to seek the return of the gift. The deceased claimant's spouse also asserts that the issue of whether respondent is entitled to the return of the wheelchair lift from the van has not been preserved for appeal. She further argues that the van is not medical treatment as defined by the Workers Compensation Act and, therefore, this entire appeal should be dismissed as being outside the jurisdiction of the Board. To the extent that the Board considers this matter, however, decedent's spouse requests that the Award of the ALJ be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Terry Hayes, the deceased claimant's spouse, testified that after claimant's injury on August 16, 2004, he was hospitalized first in Missouri, then in Colorado, and finally in Overland Park, Kansas. On March 5, 2005, while claimant was still hospitalized in Colorado, respondent purchased a wheelchair accessible van in the name of claimant and his spouse. Claimant died on April 17, 2005, without ever having ridden in the van.

Mrs. Hayes admitted that respondent purchased the van but stated she did not sign any contract or agreement with respondent or any other entity saying that they had any interest in or right to the van. Since respondent was not required under the Act to provide claimant with a van, Mrs. Hayes claims the van was a gift. The Odometer Disclosure Statement and the Bill of Sale of the van both listed Randy and Terry Hayes as purchasers. Mrs. Hayes has paid the sales tax and had the title registered in her name. The Certificate of Title shows the names of Randy and Terry Hayes as owners. Application for the Certificate of Title was made on July 6, 2005. Mrs. Hayes obtained insurance for the van on August 25, 2005. She obtained a handicapped placard for the van on

March 11, 2005. She did not seek reimbursement for any of these expenses from respondent, and respondent has not offered to pay any of these expenses.

The only time Mrs. Hayes drove the van was to get it insured and to get license tags, which was after the death of her husband. She testified that she spent every day and night in the hospital with her husband and did not get around to taking care of getting tags and insurance coverage for the van until several months after decedent's death. Her plan is to sell the van.

The Board disagrees with the ALJ's application of equitable estoppel as there was no detrimental reliance by either the decedent or the decedent's spouse to the respondent's failure to make known and protect its interest in the van. In addition, estoppel is an affirmative defense which must be specifically pled or it is waived. The Board finds no mention of estoppel at the Regular Hearing or in claimant's submission brief to the ALJ.¹

The Board also disagrees with the ALJ's finding that respondent intended to make a gift of the van. The absence of a lien or contract providing for the return of the van does not establish such an intent.

To establish a gift inter vivos there must be (a) an intention to make a gift; (b) a delivery by the donor to the donee; and (c) an acceptance by the donee. The gift must be absolute and irrevocable. [Citations omitted.] The elements of intent, delivery, and acceptance are usually questions of fact to be determined by the jury. [Citation omitted.]²

Furthermore, even if the van was a gift, it was obviously a conditional gift as it was given in contemplation that the decedent would need it for transportation to and from medical appointments and treatment. Upon decedent's death, that purpose ceased to exist, and the van should be returned to its donor.

Under the facts of this case, the van constituted medical treatment.³ As the van is no longer medically necessary, it should be returned to the respondent. If it is not, K.S.A. 44-534a(b) provides an alternate remedy.

If compensation in the form of medical benefits or temporary total disability benefits has been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to an award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the

¹ See *Coffman v. State*, 31 Kan. App. 2d 61, 59 P.3d 1050 (2002).

² *Heiman v. Parrish*, 262 Kan. 926, 928, 942 P.2d 631 (1997).

³ See *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, 935 P.2d 1083 (1997).

employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer's insurance carrier shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a and amendments thereto, **for all amounts of compensation so paid which are in excess of the amount of compensation the employee is entitled to less any amount deducted from additional disability benefits due the employee pursuant to subsection (c) of K.S.A. 44-525**, and amendments thereto, as determined in the full hearing on the claim. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith. No reimbursement shall be certified unless the request is made by the employer or employer's insurance carrier within one year of the final award. (Emphasis added.)

K.S.A. 44-525(c) only permits an offset or credit for overpaid temporary total disability compensation against future disability benefits, not for overpaid medical compensation.⁴ Should Mrs. Hayes not return the van to the respondent, then respondent and its insurance carrier may apply to the director for reimbursement from the Workers Compensation Fund.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated February 14, 2006, is modified to grant respondent and its insurance carrier the return of the van and, in the alternative, the right to seek a determination by the director of the amount of the overpayment of medical treatment and to certify that amount to the commissioner of insurance for reimbursement from the Workers Compensation Fund.

IT IS SO ORDERED.

⁴ *Steele v. Home Depot*, No. 1,000,410, 2005 WL 831900 (Kan. WCAB Mar. 31, 2005).

Dated this _____ day of June, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael A. Williams, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director